

90-260

Supreme Court, U.S.

E I L E D

AUG 6 1990

JOSEPH F. SPANOL, JR.  
CLERK

No.

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term 1990

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RICHARD J. WAGNER,  
Petitioner

v

PENNSYLVANIA REAL ESTATE COMMISSION,  
Respondent.

---

PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF PENNSYLVANIA

August 6, 1990

RICHARD J. WAGNER, pro se  
1502 Cumberland Street  
Lebanon, Pa. 17042



QUESTIONS PRESENTED

1. Was the case res judicata?
2. Was jurisdiction of the case in the U.S. Bankruptcy Court?
3. Was petitioner denied counsel?
4. Was petitioner deprived of due process and equal protection of the laws secured by Amendment 14(1) of the U.S. Constitution?



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RICHARD J. WAGNER,  
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PENNSYLVANIA REAL ESTATE COMMISSION,  
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PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF PENNSYLVANIA

---

The petitioner Richard J. Wagner respectfully prays that a writ of certiorari issue to review the opinion and order of the Commonwealth Court of Pennsylvania entered on 6-6-89; and the denial of petitioner's Petition For Allowance Of Appeal by the Supreme Court of Pennsylvania on 3-9-90.



OPINION BELOW

No opinion was rendered by the Supreme Court of Pennsylvania.

The opinion and order of the Commonwealth Court of Pennsylvania filed on 6-6-89 is reprinted in the Appendix A.

JURISDICTION

June 6, 1989 is the entry date of the opinion and order of the Commonwealth Court of Pennsylvania sought to be reviewed. Appendix A.

August 16, 1989 is the entry date of the "ORDER" of the Commonwealth Court of Pennsylvania denying "Application For Reargument". Appendix B

March 9, 1990 is the entry date of the order of the Supreme Court of Pennsylvania denying Petition For Allowance of Appeal. Appendix C

August 6, 1990 is the Order date to



which the Supreme Court of the U.S. extended  
the time to file this Petition of Writ of  
Certiorari. Appendix D

Jurisdiction is invoked under 280 USC  
§ 1257(3).

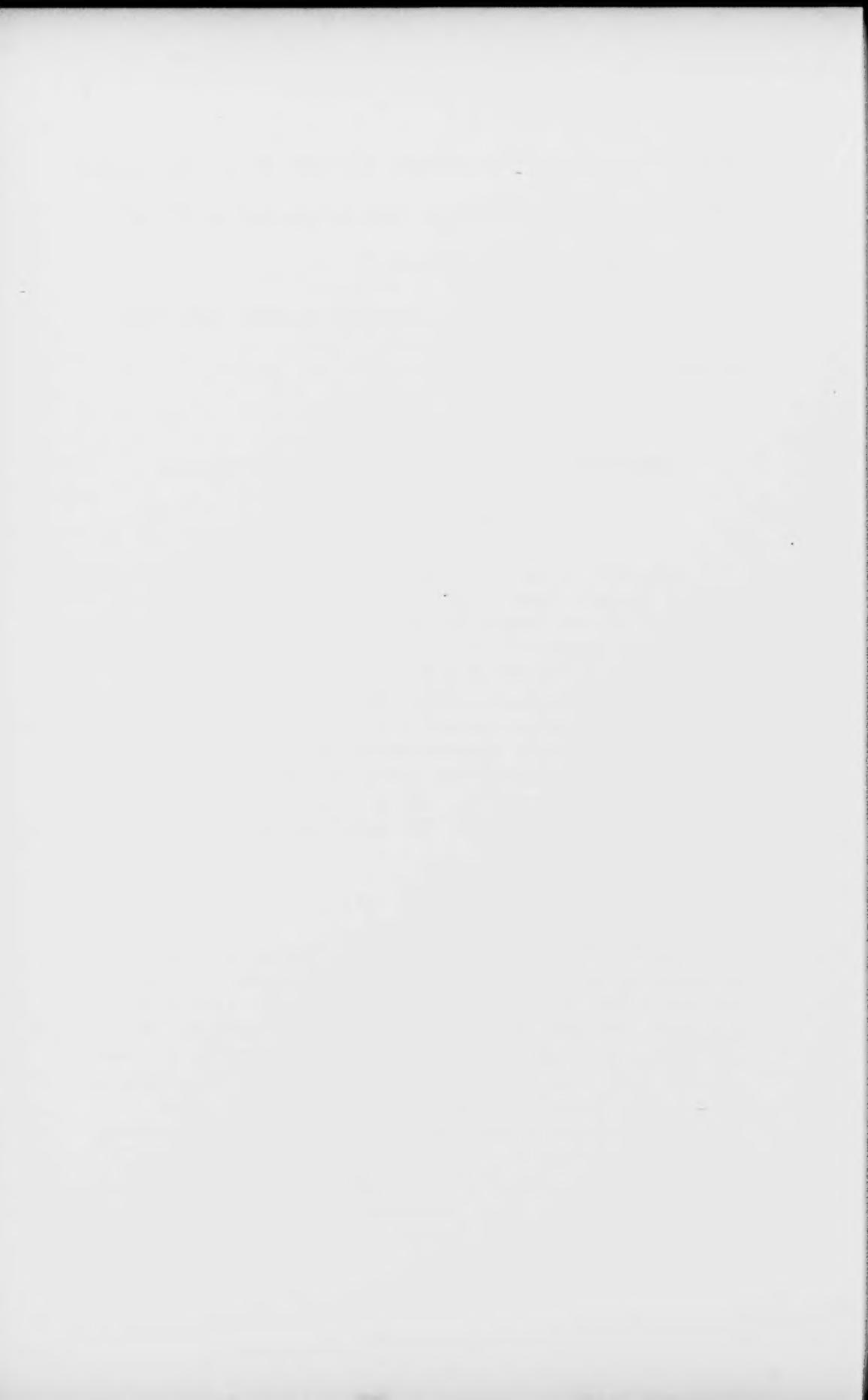
#### CONSTITUTIONAL PROVISIONS INVOLVED

##### AMENDMENT 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence.

##### AMENDMENT 14(1)

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



## STATEMENT OF THE CASE

Petitioner has been in the real estate brokerage business about 12 years.

As a result of malicious prosecution, the Pennsylvania State Real Estate Commission revoked petitioner's real estate license, which revocation was affirmed by the Commonwealth Court of Pennsylvania, opinion and order dated 6-6-89. Appendix A

The State Real Estate Commission has wrongfully, unjustly and maliciously deprived petitioner of his means of support and subsistence--livelihood.

On 5-27-82, petitioner entered into an "AGREEMENT" to sell Francis and Leonard Hamerly a parcel of land on which they were required to settle on 6-16-82.

On 6-16-82 they were unable to settle and requested an extension of time to do so, until 6-18-82, which was agreed to in the written "INDORSEMENT TO AGREEMENT OF SALE",



duly signed by the respective parties to the "AGREEMENT". It was made expressly to accommodate the Hamerly's for their sole benefit.

On both 6-16-82 and 6-18-82, Petitioner was ready, willing and able to make settlement, to convey the property at issue, free and clear of any liens or encumbrances, including production of a Quit Claim Deed from the Basic Bible Church of which petitioner, as agent for the Church, was authorized to do.

There were no liens against said real estate since title was in the Church, and the Church had no liens against it. Any statement to the contrary is absolutely erroneous.

On 6-18-82, the Hamerlys again failed to make settlement as required by said written instruments.

Thus, the Mamerlys defaulted again, which relieved petitioner of any liability.



Since 6-18-82, the Hamerlys, in concert with their attorney, Bruce Waltman, have conducted a relentless, unlawful conspiracy of harassment against petitioner.

On 7-21-82 the Hamerlys, through their attorney, Bruce Waltman, filed a suit to No. S-1241-1982, in the Court of Common Pleas of Schuylkill County, for "SPECIFIC PERFORMANCE" of said "AGREEMENT", in furtherance of the conspiracy.

On 11-8-82, Judge Dolbin in that case No. S-1241-1982, supra, rendered his "Opinion of Court", and "Order of Court", in favor of Wagner. Appendix E

That court erroneously held:

This argument is specious and requires us to note only that the only identity between the two actions is that Wagner was a defendant in both, thereby falling short of the required four identities for res judicata effect. App 8

The final judgment rendered by the Court of Common Pleas, on the merits, in the case of,



FRANCIS M. HAMERLY and  
LEONARD A. HAMERLY, his son  
VS  
RICHARD J. WAGNER  
IN THE COURT OF COMMON PLEAS FOR  
SCHUYLKILL COUNTY  
No. S-1241-1982  
Specific Performance

is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, points or questions or subject matter which was in controversy or dispute and has been authoritatively and finally settled by the Court of Common Pleas. See Matchett v Rose, 36 Ill. App. 3d 638, 344 N.E. 2d 770, 779. Tiffany Production of California v Superior Court for Los Angeles County, 131 Cal. App. 729, 22P. 2d 275.

Thus, it is crystal clear that neither the opposition parties nor the Real Estate Commission has the right to litigate the subject-matter.



That case embodies all the necessary ingredients of Res Judicata which more fully appears below:

- a. It identified the thing sued for, "Specific Performance". That issue was the same in both cases, "Specific Performance".
- b. It identified the cause of action. There was a final judgment on the merits, holding that there was no merit to the case.
- c. It identified the persons and parties to the action. The party against whom the plea is asserted was in privity with the party to the prior adjudication.
- d. It identified the quality in the persons for or against whom the claim is made. The parties against whom it is asserted have had full and fair



opportunity to litigate the issues  
in question in the prior action,  
No. S-1241-1982.

The doctrine of res judicata has been  
judicially created. It reflects the refusal  
of the law to tolerate a multiplicity of  
litigation. It holds that an existing final  
judgment rendered on the merits,

"is conclusive of causes of action and  
of facts or issues thereby litigated,  
as to the parties, in all other actions  
in the same or any other judicial tri-  
bunal of concurrent jurisdiction."

46 Am. Jur. 2d, Judgments, section 394  
at 558-559. Day v Volkswagenwerk Aktien-  
gellschaft, 318 Pa. Superior Ct. 225,  
464 A.2d 1313, 1316 (1983) /

C. NO FRAUD WAS ALLEGED IN No. S-1241-  
1982 AGAINST WAGNER BECAUSE THERE  
WAS NONE

The opposition alleged no fraud in case  
No. S-1241-1982 against Wagner because there  
was no fraud. The presumption is that it  
would have alleged fraud if there was any.



D. THE OPPOSITION IS FORBIDDEN TO RAISE  
ISSUES THAT COULD HAVE BEEN LITIGATED  
IN THE FIRST SUIT BUT WERE NOT

The law on res judicata and collateral estoppel is well-settled that it is forbidden to raise issues that could have been litigated in the first case No. S-1241-1982 but were not as cited below:

"moreover, a party is commonly forbidden to raise issues that could have been litigated in the first suit but were not, because of the desirability of settling the entire controversy in a single proceeding."

It was so held,

In re Estate of R.L.L. 487 Pa. 223, 238, n.7, 409 A2d 321, 323 n.7 (1979), quoting Cramton, Currie and Kay, Cases on Conflict of Laws 2d Ed. ABC. p 655 (1975). See also: Haring v Prosise, U.S. \_\_\_, n. 10, 103 S. Ct. 2368, 2375 n. 10, 76 L.Ed. 2d 595, 606 n.10 (1983). Day v Volkswagenwerk Aktiengesellschaft, supra, at p. 1316.

"The doctrine of res judicata applies to and is binding, not only on actual parties to the litigation, but also to those who are in privity with them." Day v Volkswagenwerke Aktiengesellschaft, supra, at p.p. 1317.



E. "ISSUE PRECLUSION",  
"SPECIFIC PERFORMANCE"

The Court overlooked that the particular issue of, "Specific Performance", has already been litigated, which means that further litigation of the same issue is barred.

Hawkeye Sec. Ins. Co. v Ford Motor Co., Iowa,  
199 N.W. 2d 373, 379.

As it relates to civil actions, concept of "issue preclusion" is in substance that any fact, question or matter in issue and directly adjudicated or necessarily involved in determination of action before court of competent jurisdiction in which judgment or decree is rendered on merits, as in the instant case, is conclusively settled by judgment therein and cannot be relitigated in any future action between the parties or privies, either in the same court or court of concurrent jurisdiction, while judgment remains unreversed or unvacated by proper



authority, regardless of whether claim or cause of action, purpose or subject matter of two suits is same. Palma v Powers, D.C. Ill., 295 F. Supp. 924, 933.

**F. ULTIMATE CONTROLLING FACTS SET FORTH  
IN OPINION OF JUDGE DOLBIN IN CASE No. S-1242-82**

The Commonwealth Court also overlooked the ultimate controlling facts set forth in the "OPINION OF COURT" dated 11-8-82 by Judge Dolbin in case No. S-1241-82. They are made an integral part hereof by reference, supra.

**G. THE SALE OF THE REAL ESTATE TO  
THE JAMESES.**

The Commonwealth Court misapprehended or overlooked the ultimate facts regarding the lot sale to Patrick and Cheryl James.

Wagner had informed the Jameses of the vow of poverty, that the title was in the Basic Bible Church of America, that the Church would issue title to the lot to the Jameses which would be prepared in the office



of title agent Richard W. Pugh. There were no liens against the Church or against that lot.

The Jameses read the written sales agreement, stated that they understood it, and then signed it.

They also read the written endorsement on the sales agreement, stated that they understood it, and then signed it too.

On 12-8-82, Wagner entered into a written contract for the sale of real estate with Mr. and Mrs. James.

On 12-8-82, a Deed to that real estate specified in the contract was given to the Jameses which was recorded by them on that day in the Recorder of Deeds Office, Schuylkill County.

Thereafter, Mr. James applied to Richard W. Pugh, agent, for title insurance.

Attorney Waltman, in unlawful collaboration with agent Pugh, conspired not to issue title insurance.



By "ORDER OF COURT" dated 8-7-84, Richard W. Pugh was designated agent for that title insurance.

But that agent gave the lame excuse, that he was debating whether to issue title insurance because a church was involved.

The Church was always ready and able to issue a fee simple title.

Ever since 6-18-82, the Hamerlys in collusion with their attorney Bruce Waltman, have severely harassed Wagner and unlawfully conspired to avoid, negate or destroy the written contract by patent unconscionable perjurious testimony and by toher nefarious actions. This fact was not disputed by the opposition, nor addressed by the Court.

#### H. JURISDICTION WAS IN BANKRUPT CY COURT, NOT IN THE REAL ESTATE COMMISSION

The U.S. Bankruptcy Court, E.D., Pa., acquired jurisdiction of the subject-matter on 9-25-85, No. 85-04027T, when Wagner filed a Chapter 13 voluntary bankruptcy petition.



The Bankruptcy Court issued an Order on 6-4-86 (Reproduced Record, Exhibit A, 3rd page) dismissing the case but Wagner on 6-13-86 filed a timely "MOTION TO MODIFY 'ORDER'" (Reproduced Record, Exhibit A, 4th page).

That Motion operated as a suspension of the dismissal Order until its disposition by the Bankruptcy Court which more fully appears in the Rule quoted as follows:

(b) Effect of Motion on Time for Appeal. If a timely motion is filed in the bankruptcy court by any party ...the time for appeal for all parties shall run from the entry of such order ...granting or denying...such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect;...  
--Bankruptcy Rule 8002(b).

A copy of the Bankruptcy Court Docket, hereto attached as EXHIBIT D, shows the entry of said Order entered on 6-4-86, dismissing the bankruptcy case, and also shows entry of Wagner's timely MOTION entered on 6-13-86.

A copy of Bankruptcy Rule 8002(b) is also hereto attached as EXHIBIT E.



The Bankruptcy Court has not disposed of said MOTION even though Wagner made several requests for it to do so. Any allegation to the contrary is patently false.

Since that time, 9-25-85, when Wagner filed his petition in the Bankruptcy Court, it has had jurisdiction, not the Real Estate Commission or the Commonwealth Court. The Commonwealth Court erroneously held that the Bankruptcy issue is moot; based on the erroneous contention that the Bankruptcy petition was dismissed on 1-14-87, which is patently untrue. Nothing was dismissed on 1-14-87. App. 6 and App. 7.

The court misapprehended the powerful conspiracy among attorneys and their collaborators to cheat and defraud Wagner out of his real estate licenses.

Wagner made diligent efforts to obtain unbiased and objective counsel, to no avail.

A cursory inspection of the court records



discloses that a coterie of attorneys in collaboration with the Hamerlys and title insurance agent Robert W. Pugh are hell-bent, stubbornly and recklessly determined to destroy Wagner, in and out of court, financially and physically because he would not surrender to their unlawful demands and misconduct.

That situation was exacerbated, it became more violent, severe, malicious and spiteful when case No. S-1242-1982 was determined by Judge Dolbin, in favor of Wagner, adversely to the opposition resulting in, inter alia, the instant litigation, fraudulent revocation of Wagner's Real Estate licenses.

One attorney demonstrated his unprovoked hostility by threatening Wagner with his fists.

In light of the foregoing, it has been impossible for petitioner to obtain objective and unbiased counsel.

The court below passed over the issue by holding that petitioner has enough time to



obtain counsel. App 9.

The law does not ordain the impossible.

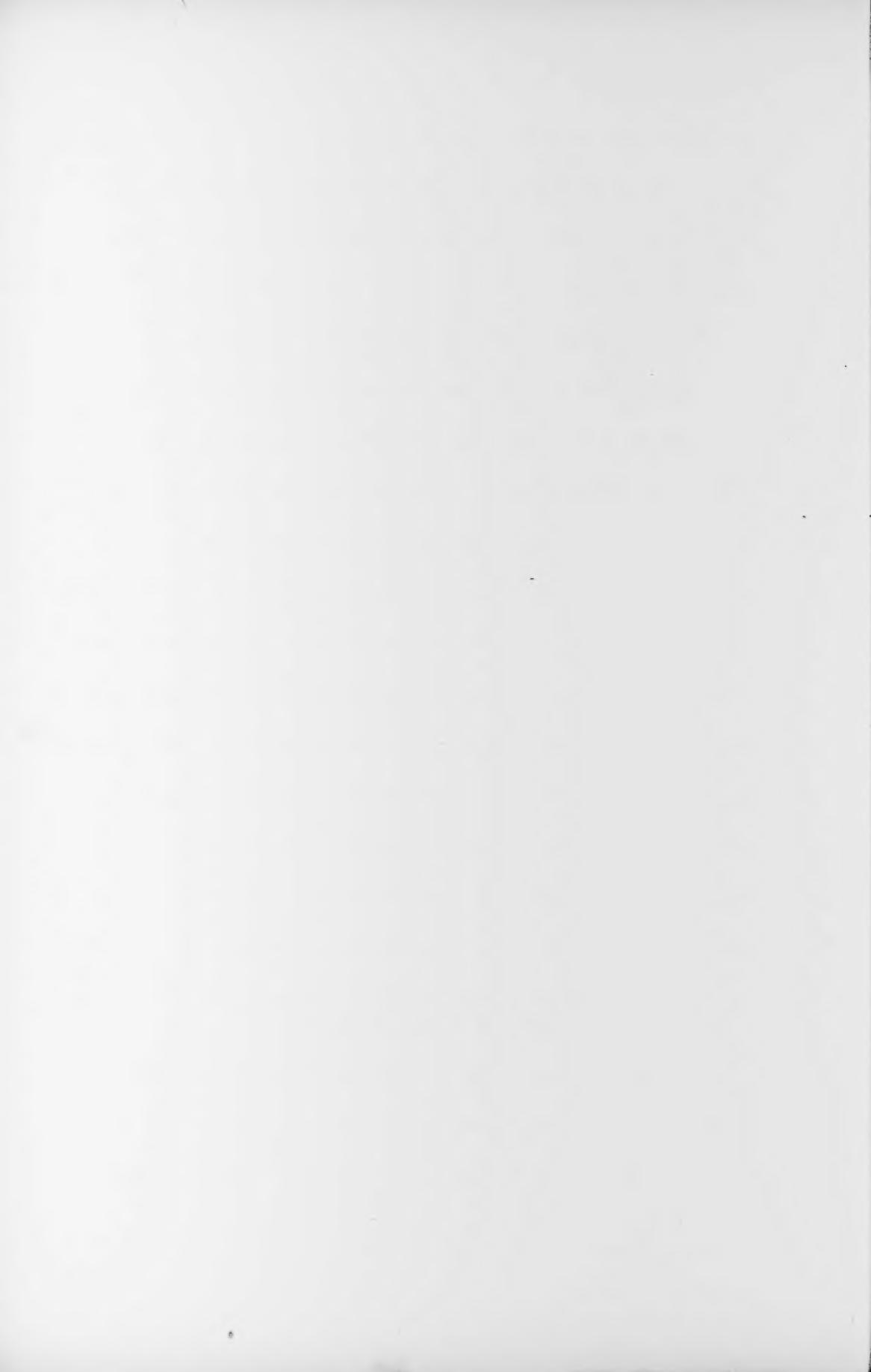
The right to counsel tolerates no compromise.

J. IMPORTANCE OF LEGIBLE DOCUMENTS

The Court misapprehended the importance of legible EXHIBITS. Illegible EXHIBITS are without integrity. Wagner was entitled to be served with legible documents. The conspirators placed his licenses in jeopardy with sham charges. Those illegible documents prejudiced. Thereby he was deprived of due process and equal protection of the law secured by the U.S. Constitution, Amendment 14(1). The court below erroneously held that the opposition was not required to furnish petitioner legible documents. App. 8

K. WAGNER WAS DENIED ADEQUATE TIME TO FILE A BRIEF

Wagner was severely prejudiced in the Real Estate Commission's denial to grant him the extension of time he needed and requested

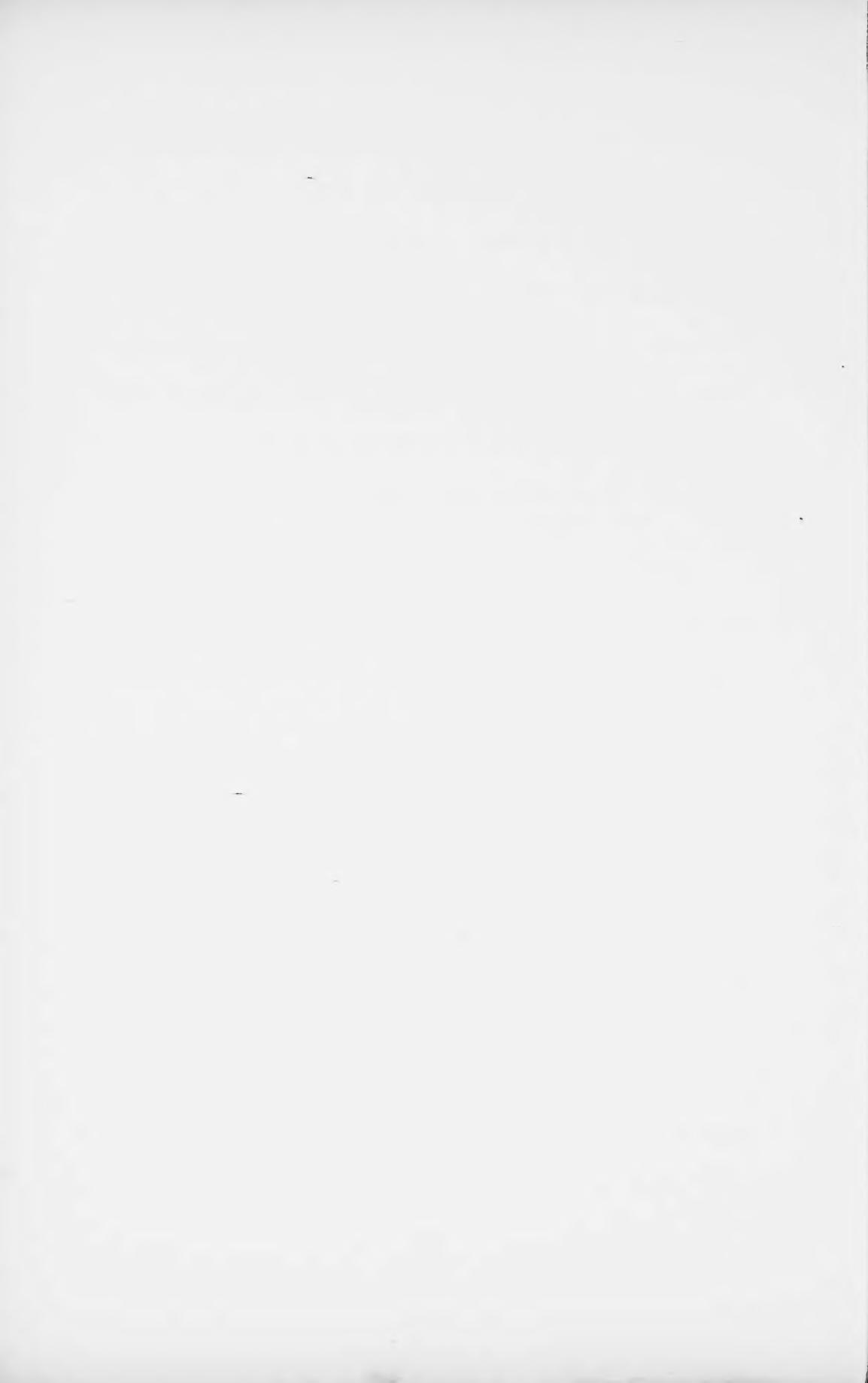


to more fully prepare his brief in support of exceptions to the hearing examiner's report of April 30, 1986. Despite the tactics employed by the opposition to delay and obstruct justice, cited above, the court below erroneously held that petitioner did not need more time to file a brief. App. 9

**L. WAGNER WAS DEPRIVED OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS**

The foregoing ultimate controlling facts were asserted below and overlooked or misapprehended by the Pennsylvania Department of State, Commissioner of Professional Occupational Affairs, and by the Commonwealth Court of Pennsylvania, which deprives Wagner of due process and equal protection of the laws secured by the U.S. Constitution, Amendments 5 and 14(1).

A cursory inspection of the record shows that the courts below were severely biased and prejudiced denying petitioner access to the courts.



II  
REASONS FOR GRANTING THE PETITION

This case presents questions whose resolution will have immediate importance far beyond the particular facts and parties involved.

It is the purpose of this Honorable Court to secure rights and uniformity of judgments.

In a sense, petitioner is defending a class action, that he not only represents himself, but tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country.

FIRST, the questions are substantial.

SECOND, the questions were properly raised below.

THIRD, the decisions below cannot be sustained on an independent ground of state law.



Petitioner submits, the decision below is in conflict with other decisions of this Supreme Court of the United States and is plainly wrong.

III  
CONCLUSION

For the above reasons, petitioner submits that he should be granted this Petition For Writ of Certiorari.

DATE" 8-6-90      Respectfully submitted  
                          S/Richard J. Wagner



A P P E N D I X



APPENDIX A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 2904 C.D. 1987

RICHARD J. WAGNER,  
Petitioner  
v.

COMMONWEALTH OF PENNSYLVANIA,  
STATE REAL ESTATE COMMISSION,  
Respondent

BEFORE: HONORABLE DAVID W. CRAIG, Judge  
HONORABLE FRANCIS A. BARRY, Judge  
HONORABLE GENEVIEVE BLATT, Senior  
Judge

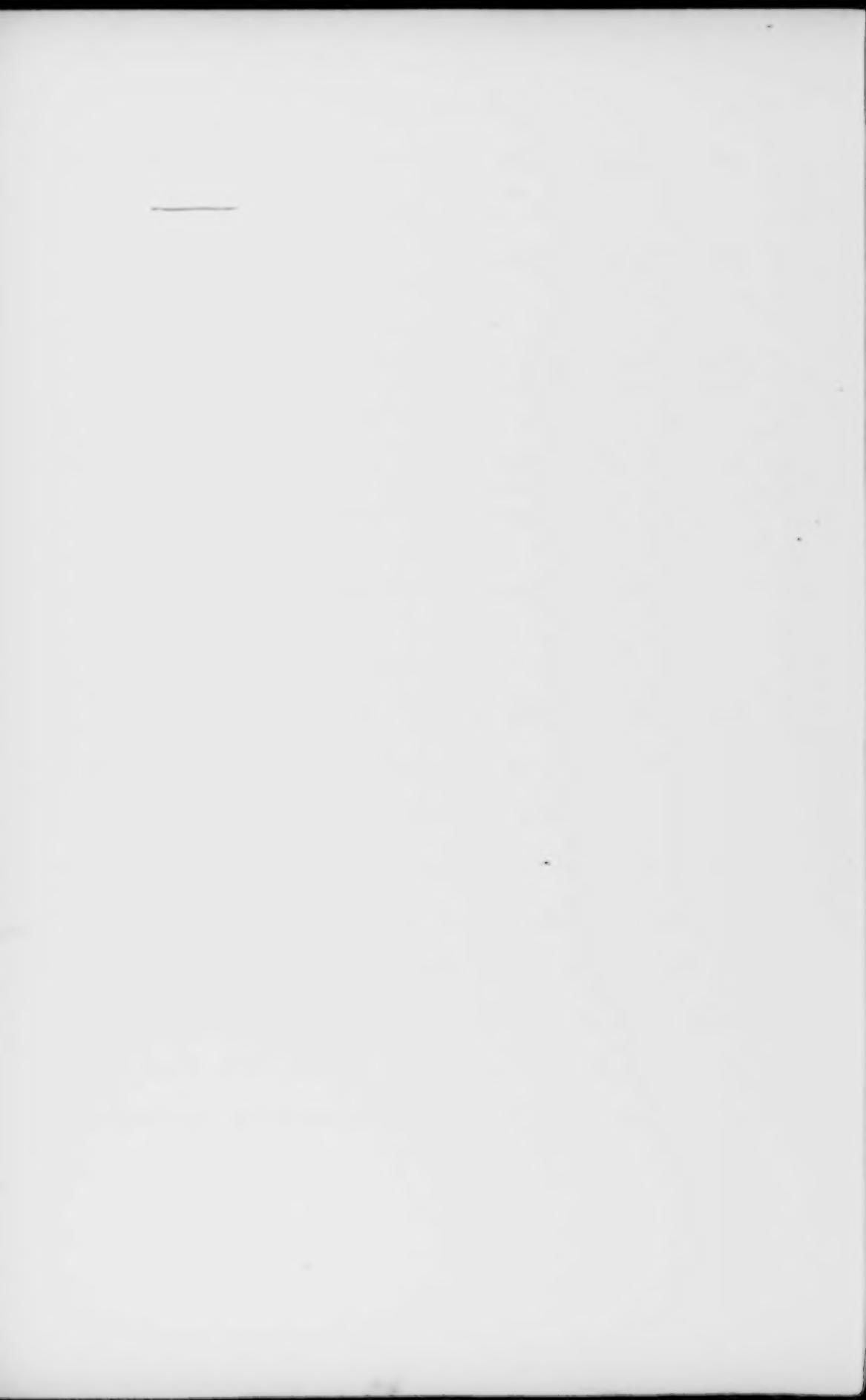
SUBMITTED ON BRIEFS: February 24, 1989

OPINION

OPINION BY JUDGE BARRY FILED: June 6, 1989

Richard J. Wagner appeals an order of the State Real Estate Commission (Commission) which revoked his licenses as a broker, associate broker and salesperson.

In May of 1985, the Commission issued a complaint and order to show cause why his licenses should not be revoked. The complaint charged Wagner with various violations



of Section 604 of the Real Estate Licensing and Registration Act ("Licensing Act"), Act of February 19, 1980, P.L. 15, as amended, 63 P.S. §455.604. Hearings were held, after which a hearing examiner recommended that Wagner's licenses be revoked. Wagner filed exceptions which were denied and the Commission revoked Wagner's licenses. This appeal followed.

The revocation of Wagner's licenses are based on the following two incidents. In late 1978, Wagner executed and recorded a "vow of poverty" in favor of the Basic Bible Church of America. That document stated in pertinent part that Wagner "do[es] hereby give...all of my...real property...to the Church..." (Board's adjudication and order, October 22, 1987, p.6). In 1982, Wagner entered into an agreement of sale to convey certain real property<sup>1</sup> to Francis M. Hamerly



and Leonard A. Hamerly. The agreement called for a June 16, 1982 closing and further declared that time was of the essence. At the time of signing the agreement, Wagner disclosed to the Hamerlys that certain liens encumbered the property which would be satisfied out of the sale proceeds; Wagner did not disclose the existence of the vow of poverty. The Hamerlys applied for title insurance at Wagner's suggestion but were informed by the title company that no insurance would be issued because of the liens and the vow of poverty. The Hamerlys granted Wagner an extension of the closing date so that he could obtain the necessary documents from the church to clear the title. Wagner pressed for settle-

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<sup>1</sup>The agreement called for the sale of two contiguous unimproved lots, one of which was owned by Wagner and the other by Betty J. Keenan. The agreement did not satisfy the amount being paid for each parcel but rather called for a single sale price of \$32,000.00.



ment without that documentation by proposing a reduction in the sales price. The Hamerlys rejected the proposal after which Wagner refused to settle the deal. The Hamerlys sued in equity for specific performance and the Court of Common Pleas of Schuylkill County, after once dismissing the hamerlys' complaint, entered a decree on August 7, 1984, requiring Wagner to convey the property.<sup>2</sup>

In the second incident, Wagner signed an agreement of sale on December 8, 1982, promising to convey to Patrick and Cheryle James a lot for \$5000. Settlement occurred that same day with Wagner delivering a deed in return for the full purchase price. Wagner never informed the Jameses of the vow of poverty or

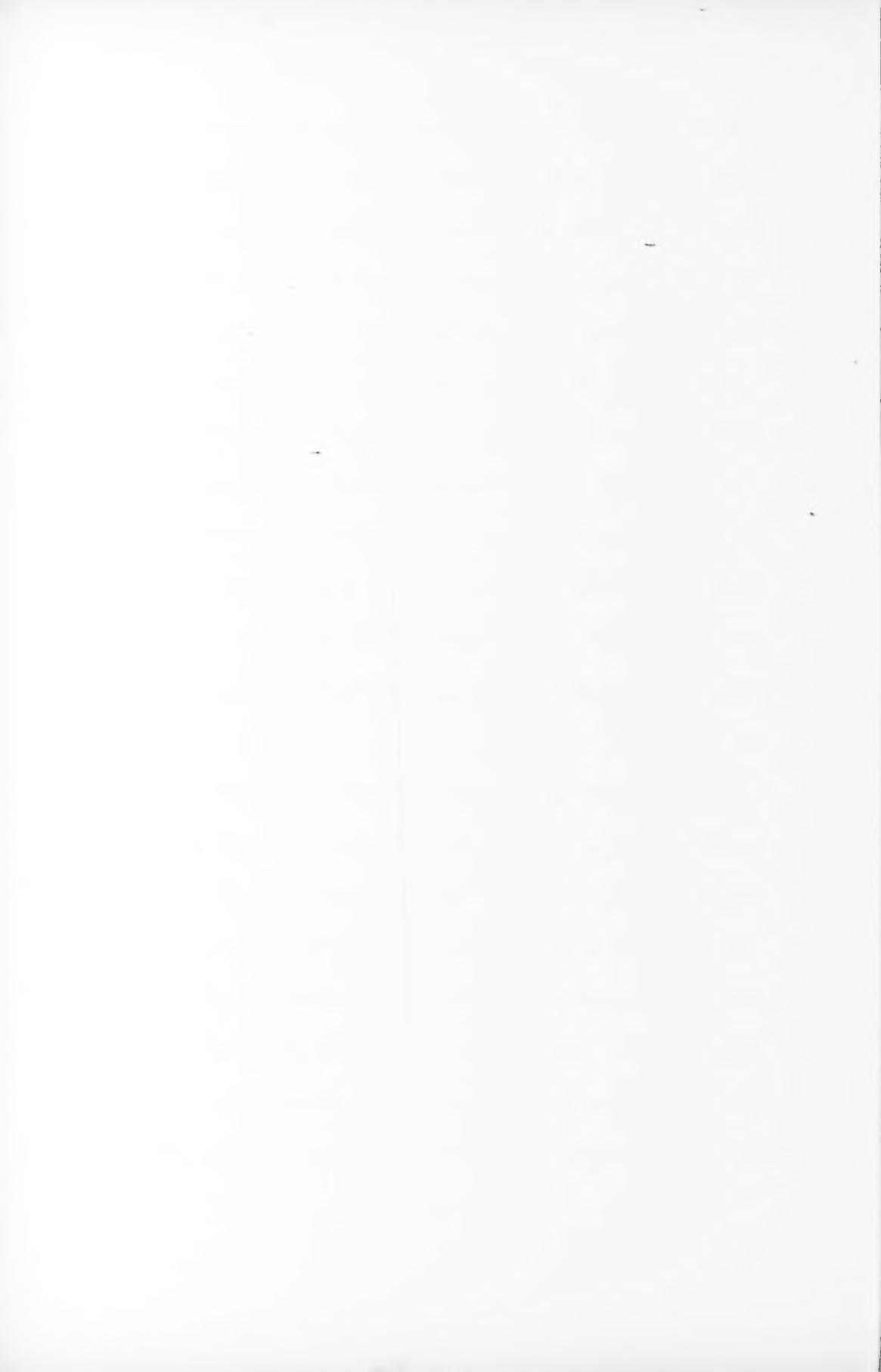
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<sup>2</sup>It cannot be ascertained from the record whether Wagner has complied with this decree of the trial court.



of various liens against the property. Wagner did assure the Jameses that no title problems existed. Wagner also did not inform the Jameses, first time buyers of real estate, that a title search was necessary to protect their interests. Finally, Wagner never explained an endorsement on the sales agreement which provided that the Jameses would take whatever title Wagner could give with no abatement in the purchase price. As of the former hearings in this matter, Wagner had neither cleared the title problems nor returned the Jameses' money.

The Commission concluded that Wagner had committed acts which are prohibited by Section 604(a) of the Licensing Act. First, it concluded that Wagner had made substantial misrepresentations in violation of Section 604(a)(1). Next, the Commission concluded that Wagner had made false promises "likely to influence, persuade or induce any person



to enter into any contract when [the promisor] could not...keep such promise." 63 P.S. §455.604(a)(2). The Commission also concluded that the conduct in the real estate transactions demonstrated "bad faith, dishonesty, untrustworthiness, or incompetency." 63 P.S. §455.604(a)(20). Subsection 15 also prohibits licensees from violating any Commission regulation and here Wagner had violated a regulation which prohibits assurances which the licensee knows to be incorrect. 49 Pa. Code §35.103. Based upon Section 604 which gives the Commission the power to revoke one's license for violations thereof, the Commission revoked all of Wagner's licenses. This appeal followed.

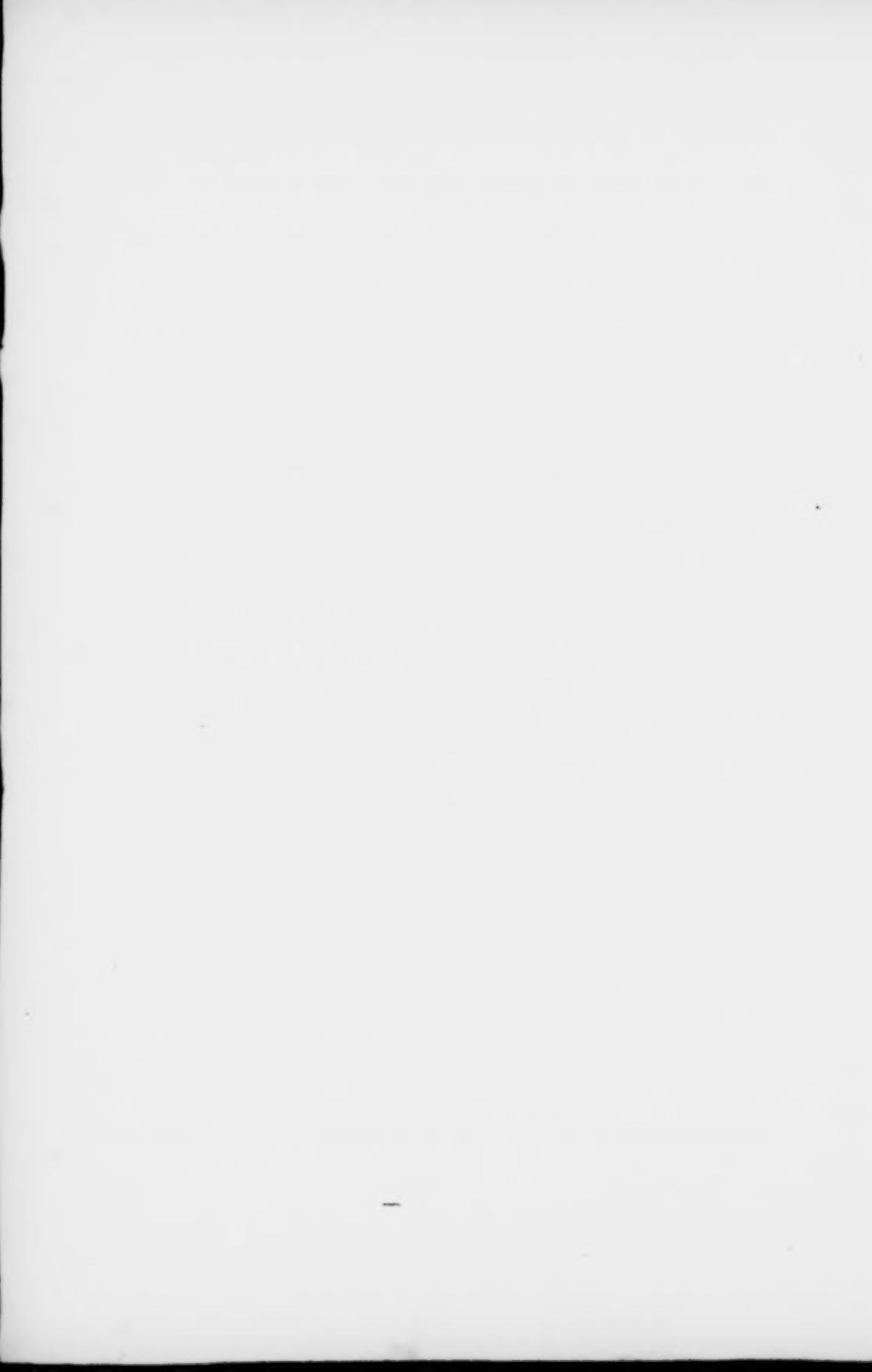
Wagner, who has proceeded pro se throughout, makes several allegations of error, none of which has any merit. Accordingly, we shall affirm the Commission's order.

He first argues that a Chapter 13 Bank-



ruptcy petition he filed in September of 1985 deprived the Commission of jurisdiction in this case. Even assuming that Wagner's argument is correct, we need not address it as this argument is moot because the bankruptcy court dismissed the petition on January 14, 1987, well before the hearings held before the Commission.

Wagner next argues that the Commission lacked jurisdiction over him because he was acting as a seller and not as a licensee. We have rejected the same arguments and held that ethical standards of the Licensing act's predecessor applied when a licensee was acting as principal. Fibus v. State Resl Estate Commission, 7 Pa. Commonwealth Ct. 74, 299 A.2d 375 (1973); Yingling v. State Real Estate Commission, 8 Pa. Commonwealth Ct. 556, 304 A.2d 524 (1973). The prohibited conduct under the Licensing Act is substantially similar to that contained in its predecessor act and we



believe our precedent is equally applicable to the present Licensing Act.

Wagner next argues the original dismissal of the Hamerlys' suit for specific performance was res judicata on these administrative proceedings. This argument is specious and requires us to note only that the only identity between the two actions is that Wagner was a defendant in both, thereby falling short of the required four identities for res judicata effect. Glasgow, Inc. v. Department of Transportation, !)\* Pa. Commonwealth Ct. 448, 529 A.2d 576 (1981).

Wagner next argues that he was denied due process in three regards. He first argues that certain exhibits contained in the administrative complaint were illegible and thereby prevented him from preparing a defense. All of the exhibits in question were documents to which Wagner was a signatory. Further, all of



the allegations in the complaint itself were very specific. Considering all of this, we agree with the Commission's conclusion that this argument is absurd.

He next alleges that he was denied the assistance of counsel. Wagner argued before the Commission that he could not obtain counsel because of a conspiracy between attorneys to cheat and defraud him of his licenses. Wagner had almost six months after the complaint had been filed before the hearings were held. Considering Wagner's excuse for not retaining an attorney after being informed of his right to an attorney, we see no error in proceeding with Wagner acting pro se.

Finally, Wagner argues that he was denied due process when the Commission refused his request for extension of time to file a brief in support of exceptions to the hearing examiner's report of April 30, 1986. On May 21,



Wagner sought the extension of time alleging that he was ill, that he was pro se and that he was unfamiliar with the Licensing Act and the regulations of the Commission. The Commission denied his request and on May 29, 1986, Wagner filed his brief. As the Commission stated in its final order and adjudication, "Given [Wagner's] prior procedural maneuverings, the Commission is inclined to view the motion for additional time to file the brief...as the latest in a series of tactics employed...to delay [Wagner's] day of reckoning on the charges." (October 22, 1987 Order and Adjudication, p.20). We do not believe the Commission abused its discretion in refusing the request for additional time.

Affirmed.

S/ Francis A. Barry

FRANCIS A. BARRY, Judge



IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 2904 C.D. 1987

RICHARD J. WAGNER,  
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,  
STATE REAL ESTATE COMMISSION,  
Respondent

ORDER

NOW, June 6. 1989, the order of the  
State Real Estate Commission at Nos. 82-  
RE-1064 and 83-RE-949, dated October 22,  
1987, is hereby affirmed.

FRANCIS A. BARRY, Judge



**APPENDIX B**

RICHARD J. WAGNER,

Petitioner

v.

IN THE

COMMONWEALTH COURT  
OF PENNSYLVANIA

No. 2904 C.D. 1987

COMMONWEALTH OF PENNSYLVANIA,  
STATE REAL ESTATE COMMISSION,  
Respondent

**ORDER**

NOW, August 16, 1989, having considered petitioner's application for reargument, said application is hereby denied.

Petitioner's motion for court to act on petitioner's application for reargument is dismissed as supererogatory.

BY THE COURT

S/

\_\_\_\_\_  
P. J.



APPENDIX C

SUPREME COURT OF PENNSYLVANIA  
Middle District

March 12, 1990

Richard J. Wagner  
R.D.#1, Box 1502  
Pottsville, Pa. 17901

RE: Richard J. Wagner v.  
Com., State Real Estate Comm.  
No. 237 M.D. Allocatur Docket 1989

Dear Counsel:

This is to advise that the following Order has been entered for the Petition for Allowance of Appeal for the above-captioned matter:

"March 9, 1990, Petition Denied  
Per Curiam."

Very truly yours,

S/Mildred E. Williamson  
Deputy Prothonotary

MEW/pam

xc: Honorable Francis A. Barry  
Honorable Donald D. Dolbin  
Steven Wennberg, Esquire  
Office of the Attorney General  
Chief Clerk - Commonwealth Court  
(No. 2904 C.D. 1987)  
Prothonotary - Schuylkill Co.  
(No. S-1241-1982  
APP 13



APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-876

Richard Wagner,  
Petitioner  
v.

Pennsylvania Real Estate Commission

ORDER

UPON CONSIDERATION of the application  
of the petitioner,

IT IS ORDERED that the time for filing  
a petition for a writ of certiorari in  
the above-entitled case, be and the same  
is hereby, extended to and including  
August 6, 1990.

S/William J. Brennan, Jr.  
Associate Justice of the  
Supreme Court of the  
United States

Dated this 8th  
day of June, 1990.

APP 114



## APPENDIX E

FRANCIS M. HAMERLY ET AL vs. RICHARD J. WAGNER

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FRANCIS M. HAMERLY and  
LEONARD A. HAMERLY, his son  
vs.  
RICHARD J. WAGNER

### Equity — Specific Performance — Contracts

1. In contracts for the sale of real property, time is not of the essence unless it is expressly stipulated, or necessarily implied from the language of the contract or clear action of the parties.

### Equity — Specific Performance — Time Is Of The Essence — Modification Of Contract

2. Where a real estate sales contract makes time for settlement of essence to the agreement and additionally requires that any modification to the contract be in writing and signed by the parties, the plaintiffs' allegations of an oral modification of the time for settlement fails to state a cause of action.

Court of Common Pleas  
of Schuylkill County  
Civil Action—Equity

No. S-1241—1982  
Specific Performance

For the Plaintiffs  
BRUCE L. WALTMAN, Esquire  
RICHARD J. WAGNER, Pro Se

### OPINION OF THE COURT

DOLBIN, J.

On July 21, 1982, the plaintiffs, Francis M. Hamerly and Leonard A. Hamerly, his son, filed a complaint in equity against the defendant, Richard A. Wagner, requesting specific performance of a land sale contract.

The defendant, appearing pro se filed preliminary objections to the complaint in the nature of a motion to strike and a motion for a more specific complaint.

The preliminary objections to the complaint are presently before the Court for disposition.



The plaintiffs, by way of their complaint, alleged that the defendant is the owner of 8.743 acres of real estate situate in West Brunswick Township, Schuylkill County, Pennsylvania. The plaintiffs alleged that on May 27, 1982, they entered into a written agreement of sale with the defendant and one Betty Keenan, whereby the plaintiffs for the sum of Thirty-two Thousand (\$32,000.00) Dollars, agreed to purchase certain property from the defendant and Betty Keenan.

The agreement of sale provided that settlement was to be made on or before June 16, 1982. The parties by written agreement dated June 15, 1982, agreed to extend settlement to June 18, 1982,

Allegedly at the time the extension of June 15, 1982, was executed, the defendant promised to extend the settlement date beyond June 18, 1982, in order to allow plaintiffs an opportunity to complete the title search and settlement documents.

The plaintiffs made arrangements for settlement to be held on June 23, 1982. The defendant notified the plaintiffs on June 20, 1982, that since the extension period had expired, he would not settle or convey title to them.

The defendants first preliminary objections which are designated as a motion for strike are in reality a demurrer.

The defendant argues that the extension to the written agreement of sale provided for settlement to occur on June 18, 1982, and that since settlement did not occur on that date, the plaintiffs cannot compel him to perform on the contract.

The defendant also argues the agreement of sale in paragraph 12 prohibits changes to agreement unless the alterations are in writing and signed by the parties.

The plaintiff did not bring the present action in assumpsit, but rather chose to bring an equity proceeding.

Courts of equity have long held that time is not generally of the essence in a contract for the sale of land, unless it is so stated in the contract or necessarily implied therefrom. *Tolan v. O'Malley*, 450 Pa. 214, 299 A.2d 229 (1973); *Carsek Corp. v. Stephen Schifter, Inc.*, 431 Pa. 550, 246 A.2d 365 (1968); *Bogojavlensky v. Logan*, 181 Pa. Super, 312, 124 A.2d 412 (1956).

Recently the Superior Court of Pennsylvania in the case



of *Tanenbaum v. Sears, Roebuck and Co.*, 265 Pa. Super. 78, 401 A.2d 809 (1979) stated:

"...It should be made explicit that in law and equity, in contracts for the sale of real property, time is not of the essence unless it is expressly stipulated, or necessarily implied from the language of the contract or clear action of the parties."

The Court in *Tanenbaum v. Sears, Roebuck and Co.*, (Supra) stated that a conspicuous and universally recognized warning must be given to buyers that delayed performance will expose the dilatory party to a default of his interest. The Court further indicated that absent the phrase "time to be of the essence" or a similar "red flag" statement, the contract language must be painstakingly exact to make time of the essence.

In applying the above teachings of our Appellate Courts to the instant factual situation, we believe that the language in the agreement of sale and extension agreement presents a "red flag" to the purchaser that delayed performance will expose them to a default or loss of their interest. The language in paragraph 3 (g) of the land sale agreement that, "Settlement be made on or before June 16, 1982" must be read in conjunction with paragraph 16 of the contract which provides:

**16. DEFAULT (1-79).** The said time for settlement and all other times referred to for the performance of any of the obligations of this agreement are hereby agreed to be of the essence of this agreement. Should the buyer:

- (a) Fail to make any additional payments as specified in paragraph #3,
- (b) Furnish false or incomplete information to the seller, the seller's agent, or the mortgage lender, concerning buyer's legal or financial status, or fail to cooperate in processing of the mortgage loan application, which acts would result in the failure to obtain the approval of a mortgage loan commitment, or
- (c) Violate or fail to fulfill and perform any of the terms or conditions of this agreement,



then in such case, all deposit money and other sums paid by the buyer on account of the purchase price, whether required by this agreement or not, may be,

- (1) Retained by the seller on account of the purchase, or
- (2) As moneys to be applied to the seller's damages, or
- (3) As liquidated damages for such breach,

as the seller may elect, and in the event that the seller elects to retain the money as liquidated damages in accordance with paragraph #16 (3), the seller shall be released from all liability or obligation and this agreement shall be NULL AND VOID and all copies will be returned to seller's agent for cancellation."

We note in addition that paragraph 12 of the agreement of sale prohibits oral modification to the contract, any changes to the agreement being required to be in writing and signed by the parties.

In ruling upon a demurrer, we are mindful that a demurrer admits every well-pleaded material fact set forth in the pleadings, as well as all inferences, other than conclusions of law, reasonably deductible therefrom. *Gekas v. Shapp*, 469 Pa. 1, 364 A.2d 691 (1976). In the instant case, we are compelled to sustain the demurrer and dismiss the plaintiff's complaint for failure to state a viable cause of action.

In light of our decision we find no necessity to consider the defendant's other preliminary objections in the nature of a motion for a more specific pleading and accordingly dismiss the same.

Accordingly we enter the following:

**ORDER OF COURT**

AND NOW, this 8th day of November, 1982, the preliminary objections of the defendant essentially in the form of a demurrer are sustained, and the plaintiffs' complaint is hereby dismissed.

The defendant's preliminary objections in the nature of a motion for a more specific pleading are hereby dismissed.